

U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of THERESA M. GENTILE and RESOLUTION TRUST CORPORATION,
Valley Forge, Pa.

*Docket No. 97-303; Submitted on the Record;
Issued October 16, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly found that the evidence established that appellant's employment-related disability had ceased.

On April 7, 1992 appellant, then a 52-year-old investigations clerk, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that on April 6, 1992 she injured her neck and back when she was pushing, pulling and lifting boxes of documents. The Office accepted the claim for cervical sprain, thoracic sprain and lumbosacral sprain. Appellant did not return to work and the Office placed her on the periodic rolls for temporary total disability effective June 23, 1992.

In a report dated March 4, 1994, Dr. Christopher G. Lynch, an attending Board-certified physiatrist, noted on physical examination:

"She has normal motor, reflex and sensory function. She has normal, pain-free ROM [range of motion] of all upper extremity joints including the shoulders. Examination of the spine reveals no deformities. She has quite tight cervical, thoracic and lumobosacral musculature. Multiple trigger points are palpable. ROM is somewhat reduced."

Dr. Lynch diagnosed fibromyalgia, which he opined seemed "to have been brought on by the first injury and exacerbated by the second injury."

By letter dated March 10, 1994, the Office referred appellant, along with a statement of accepted facts and medical evidence, to Dr. Michael F. Busch, a Board-certified orthopedic surgeon, to clarify the cause and extent of her accepted employment injury.¹

¹ In a letter dated April 11, 1994, the Office notified appellant of the rescheduled appointment with Dr. Busch.

In a report dated May 11, 1994, Dr. Busch noted the history of the injury and that a statement of accepted facts was not in his information packet. Dr. Busch diagnosed fibromyalgia and spondylolisthesis and herniated disc at L3-L4. Dr. Busch stated that appellant's symptoms were not corroborated by physical findings and there was symptom magnification. Dr. Busch opined that appellant:

“[H]as developed degenerative arthritis in her lumbar spine as a secondary consequence of her spondylolisthesis. None of this, however, is a direct result of her compensation claim due to work injury on April 6 1992. Most likely, at this time, she suffered a lumbar strain that should have resolved in [six] to [eight] weeks. I think she could work at a sedentary position that involved minimal twisting or lifting.”

In a report dated August 22, 1994, Dr. Henry J. Kneidinger, an attending physician, opined that appellant's work activity was “the cause of her present problems.” Dr. Kneidinger noted that appellant's permanent spinal column changes were aggravated by her work activity and resulted in the development of a chronic paraspinal and diffuse myofascitis” and that prior to her injury appellant “was functioning adequately and comfortably.”

In a letter dated January 18, 1995, Dr. Lynch, after reviewing Dr. Busch's report, again opined that appellant's fibromyalgia is work related. Regarding Dr. Busch's opinion, Dr. Lynch stated “I do not think he is an expert in fibromyalgia and probably does not understand this well.”

By letter dated February 14, 1995, the Office referred appellant to Dr. David B. Sussman, orthopedic surgeon, for an impartial medical examination due to the conflict in the medical opinion evidence between Dr. Busch, the Office's second opinion physician and Dr. Lynch, appellant's attending physician.

In a report dated April 4, 1995, Dr. Sussman opined, based upon an examination of appellant and a review of the medical records, that appellant is totally disabled due to fibromyalgia and spondylolisthesis and degenerative disc disease. Dr. Sussman stated that these conditions were unrelated to her injury, while lifting boxes and that her accepted employment injuries of cervical thoracic and lumbosacral sprains have resolved.

By notice of proposed termination of compensation dated August 10, 1995, the Office advised appellant that her compensation benefits would be terminated after the expiration of 30 days based upon Dr. Sussman's well rationalized and complete medical report, which demonstrated that appellant had no further residuals of her accepted employment injury. The Office determined, based upon Dr. Sussman's report, that her current disability due to fibromyalgia and spondylolisthesis and lumbar disc abnormality were not caused or aggravated by her employment.

In a letter dated August 30, 1995, appellant appealed the termination of her benefits and referred to an updated August 18, 1995 report from her treating physician, Dr. Kneidinger, which was sent to the Office.

In the August 18, 1995 report, Dr. Kneidinger again reiterated that it is his “opinion that the work activity that [appellant] was involved in is the cause of her present problems. [Appellant’s] permanent spinal column changes were aggravated by her work activity and resulted in the development of a chronic paraspinal and diffuse myofascitis.” Dr. Kneidinger also stated that prior to the employment injury appellant “was functioning adequately and comfortably.”

By decision dated September 12, 1995, the Office finalized its decision to terminate appellant’s compensation and medical benefits effective September 17, 1995 for the reason that her condition causally related to her April 6, 1992 employment injury had resolved. The Office also found that appellant’s fibromyalgia syndrome was not related to her accepted employment injury. The Office found that the weight of the medical opinion evidence was represented by the report of Dr. Sussman, the Board-certified orthopedic surgeon, acting as an independent medical examiner, who concluded that the effects of the April 6, 1992 injury had resolved and that appellant’s fibromyalgia was unrelated to the April 6, 1992 injury. The Office found that the evidence from appellant’s attending physician was insufficient to overturn Dr. Sussman’s opinion nor did the physician provide new objective findings.

In a letter dated April 19, 1996, appellant, through her counsel, requested reconsideration of the termination of her benefits on the grounds that Dr. Sussman’s opinion should not be entitled to greater weight as his opinion was not based on a complete factual history. Appellant also argues that his opinion should be given less weight as Dr. Sussman is not a Board-certified rheumatologist or psychiatrist.

In a letter dated April 24, 1996, appellant submitted a September 20, 1995 report from Dr. Daniel K. Norden, an attending Board-certified internist, a May 3, 1995 report from Dr. Robert A. Moidel, a Board-certified internist, and February 26, 1996, March 20 and February 24, 1995 laboratory results, an interpretation of an x-ray examination of appellant’s hands dated February 26, 1996, in support of her request for reconsideration.

In a May 3, 1995 report, Dr. Moidel, based upon laboratory studies, physical examination, magnetic resonance imaging test, x-ray interpretation of the lumbar spine and electromyograph test, stated:

“[M]y impression is that this patient could have fibromyalgia syndrome, but the generalized tenderness is evidence against this syndrome, since she does not have discreet trigger points. She otherwise seems to have nonspecific myalgias. I am not sure what the etiology is, but this patient could have an element of depression here.”

In a September 20, 1995 report, Dr. Norden opined that appellant’s fibromyalgia was due to her accepted employment injury. In support of this opinion, Dr. Norden noted that fibromyalgia can “clearly be exacerbated under periods of physical or emotional stress. Her symptoms were clearly related to a period of lifting heavy boxes of documents while at work. Prior to that episode, she had none of these symptoms.” Dr. Norden also noted that “physical trauma of any sort can trigger an attack and/or aggravate an attack of fibromyalgia.”

By decision dated July 9, 1996, the Office denied appellant's request on the basis that the evidence was insufficient to warrant modification of the prior decision. The Office found Dr. Norden's opinion was speculative as the physician stated, without supporting medical rationale, that appellant's fibromyalgia was due to her work injury because she was asymptomatic prior to her employment injury.

The Board finds that the Office properly found that appellant's employment-related disability had ceased.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits by establishing that the accepted disability has ceased or that it is no longer related to the employment.²

In this case, the Office accepted appellant's claim for cervical sprain, thoracic sprain and lumbosacral sprain. Appellant's attending physician, Dr. Kneidinger and Dr. Lynch, a Board-certified internist, both opined that appellant's fibromyalgia was due to her employment injury. On the other hand, Dr. Busch, a Board-certified orthopedic surgeon, to whom the Office referred appellant for a second opinion, indicated that appellant's fibromyalgia was unrelated to her accepted employment injury.

Section 8123(a) of the Federal Employees' Compensation Act provides: "[i]f there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."³ Because of the conflict in medical opinion evidence between Dr. Busch and Lynch, the Office referred appellant to an impartial medical examiner, Dr. Sussman, a Board-certified orthopedic surgeon. In his April 4, 1994 report, Dr. Sussman attributed appellant's fibromyalgia and spondylolisthesis and degenerative disc disease to nonemployment factors. Dr. Sussman also stated that appellant had recovered from her accepted employment injuries of cervical thoracic and lumbosacral sprains.

In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical examiner for the purpose of resolving the conflict, the opinion of such examiner, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.⁴ As Dr. Sussman's report was well rationalized and was based on a complete factual and medical background, it represents the weight of the medical evidence and establishes that appellant's work-related residuals had ceased. It also establishes that appellant's fibromyalgia and spondylolisthesis and degenerative disc disease are due to nonemployment factors.

² *David W. Green*, 43 ECAB 883 (1992); *Jason C. Armstrong*, 40 ECAB 907 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986); *Harold S. McGough*, 36 ECAB 332 (1984); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

³ 5 U.S.C. § 8123(a).

⁴ *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

Thereafter, appellant submitted reports from Drs. Norden and Moidel. Dr. Moidel's report is insufficient as the physician opined that appellant "could have fibromyalgia" and he was unsure of the etiology. The Board has stated that an opinion that a condition is causally related to an employment injury because the employee was asymptomatic before the injury is insufficient, without supporting rationale, to establish causal relation. Dr. Norden opined that appellant's fibromyalgia was employment related on the basis that she had no symptoms prior to her injury. Dr. Norden provided no other medical rationale in support of his opinion and, therefore, his opinion is also insufficient to create a conflict in the medical opinion evidence. Dr. Norden nor Dr. Moidel's opinions are insufficient to create a conflict in the medical opinion evidence with the well rationalized and complete medical report by Dr. Sussman.⁵ Consequently, Dr. Sussman's report remained the weight of the medical opinion evidence in this case and established that appellant had no continuing disability after September 17, 1995 causally related to her April 6, 1992 accepted employment injury.

Accordingly, the decision of the Office of Workers' Compensation Programs dated July 9, 1996 is hereby affirmed.

Dated, Washington, D.C.
October 16, 1998

George E. Rivers
Member

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

⁵ *Connie Johns*, 44 ECAB 560 (1993); *see also Billie C. Rae*, 43 ECAB 192 (1991) and cases cite therein.